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Supreme Court, U.S.
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No. 96-1017

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARTURO WEAVER, PETITIONER

v.

DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether an INS mechanic who was frequently assisted by detainee laborers is entitled to benefits under 5 U.S.C. 8336(c)(1), which limits such benefits to "law enforcement officers," defined in 5 U.S.C. 8331(20) as employees "the duties of whose position[s] are primarily the investigation, apprehension, and detention of individuals suspected or convicted of offenses against the criminal laws of the United States."

2. Whether 5 U.S.C. 8331(20) limits the statutory definition of "detention" to the employees of the agencies named in that provision, and if so, whether that Section violates the equal protection guarantee by treating employees of the named agencies differently than employees of other agencies.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 2-6) is unpublished, but it is noted at 92 F.3d 1207 (Table). The decision of the Merit Systems Protection Board (Pet. App. 9-15) is unpublished, but is noted at 69 M.S.P.B. 194 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1996. A petition for rehearing was denied on August 7, 1996. Pet. App. 8. The petition for certiorari was filed on October 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed as a mechanic at the Immigration and Naturalization Service (INS) Processing Center in Port Isabel, Texas, for more than 20 years. Pet. App. 10. The Center is used primarily to detain aliens pending deportation hearings before immigration judges. *Id.* at 11. As a mechanic responsible for heavy equipment, petitioner's job was to maintain and repair government-owned vehicles, primarily large diesel-powered buses. *Ibid.* Petitioner was often assisted by detainees suspected or convicted of federal crimes. *Id.* at 12-13, 15.

In a letter to INS dated January 31, 1994, petitioner sought retirement benefits under 5 U.S.C. 8336(c)(1). That provision establishes special retirement benefits for "law enforcement officers" (LEOs), defined in 5 U.S.C. 8331(20) as employees "the duties of whose position[s] are primarily the investigation, apprehension, and detention of individuals suspected or convicted of offenses against the criminal laws of the United States." Section 8331(20) specifies that " 'detention' includes the duties of" employees of certain named agencies "whose duties in connection with individuals in detention suspected or convicted of offenses against the criminal laws of the United States * * * require frequent * * * direct contact with these individuals in their detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation." The statutory definition of "detention" has been extended by regulation to employees of agencies not expressly named in Section 8331(20). 5 C.F.R. 831.902.

2. In a letter dated April 12, 1995, the INS informed petitioner of its determination that he was ineligible

for LEO retirement benefits. App., *infra*, 1a-7a. INS concluded that petitioner's file contained no documentation "describing [petitioner's] actual primary duties as being those of a law enforcement officer." *Id.* at 6a.

3. Petitioner appealed to the Merit Systems Protection Board, which, following a hearing, affirmed the agency's decision. Pet. App. 9-15. The Board found that petitioner had not established that the primary duties of his position were to detain individuals suspected or convicted of federal crimes. *Id.* at 14-15. The Board acknowledged that petitioner had frequent direct contact with individuals who were suspected or convicted of federal crimes, but it concluded that he did not show that the bulk of his time was spent detaining, directing, supervising, inspecting, training, employing, caring for, transporting, or rehabilitating his detainee work crews. *Id.* at 15.

4. The Federal Circuit affirmed the Board's decision. Pet. App. 2-6. The court noted that petitioner did not contest the finding that his duties were not primarily those of a law enforcement officer, and thus concluded that the petitioner was not eligible for LEO retirement benefits. *Id.* at 5.

ARGUMENT

The court of appeals correctly upheld the denial of petitioner's request for LEO retirement benefits. That decision does not conflict with any decision of this Court or any other court of appeals. In addition, petitioner's constitutional claim rests on an erroneous interpretation of the statute and implementing regulations.

1. Petitioner argues (Pet. 4-5, 7) that he is entitled to law enforcement retirement benefits because he

had "frequent * * * direct contact" with persons suspected or convicted of crimes. Under the statute, however, LEO benefits are available only to persons whose primary duties are the investigation, apprehension, or detention of suspected or convicted criminals, whether or not the employee had frequent direct contact with inmates. As the Federal Circuit correctly held (Pet. App. 2-6), petitioner's claim for such benefits must fail because, as petitioner himself concedes (*id.* at 5), his duties were not primarily those of a law enforcement officer as defined in the first portion of Section 8331(20).

The court's conclusion is fully consistent with *Obremski* v. *Office of Personnel Management and Merit Services Protection Board*, 699 F.2d 1263 (D.C. Cir. 1983), the only other court of appeals decision construing the relevant provisions of 5 U.S.C. 8331(20). In *Obremski* the court held that to qualify for LEO benefits an employee must show that his "primary duties are *functionally* related to [his] 'frequent direct contact' with inmates." 699 F.2d at 1270 n.24. That statutory construction reflects the court's recognition that a range of persons who are not law enforcement officers, such as legal services lawyers or court reporters, do not qualify for LEO benefits even though they have frequent direct contact with prisoners. Petitioner is ineligible for LEO benefits because his duties as a mechanic were not functionally related to his contact with persons suspected or convicted of federal crimes.

2. Petitioner asserts (Pet. 7-8) that the statute in question violates the equal protection guarantee because the statutory definition of "detention" impermissibly treats employees of agencies named in Section 8331(20) differently than employees of other

agencies. That argument reflects a misinterpretation of the 5 U.S.C. 8331(20), which provides that the definition of detention "includes" the duties of employees of certain named agencies. The statute does not suggest that it applies only to employees of the named agencies. Reflecting that fact, the implementing regulation explicitly makes the statutory definition of detention applicable to employees of all federal agencies. 5 C.F.R. 831.902. As the Federal Circuit correctly ruled, petitioner was ineligible for LEO benefits because his duties were not primarily those of a law enforcement officer.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1997

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* The Federal Circuit's opinion may be read, however, to suggest that the definition of detention applies only to employees of agencies named in the statute. See Pet. App. 5. Although such an interpretation of 5 U.S.C. 8331(20) would be erroneous, that error is clearly harmless as applied to petitioner's case because petitioner has admitted that his duties were not primarily those of a law enforcement officer. *Ibid.*

APPENDIX

[DOJ LETTERHEAD OMITTED]

[APR. 12, 1995]

Mr. Arturo Weaver
P.O. Box 84
Los Indios, Texas 78567

Dear Mr. Weaver:

The purpose of this letter is to inform you of the final agency decision on your claim of entitlement to Law Enforcement Officer (LEO) service credit.

I. Introduction

On January 31, 1994, February 1, 1994, and May 22, 1994, you filed claims for LEO service credit for the period July 1973 through February 1, 1994, for work assignments with the Immigration and Naturalization Service (INS) as a Diesel Mechanic. While this position is not recognized by INS as being a LEO position, you maintain that the work you actually performed was primarily law enforcement work by virtue of your alleged contact and supervision of illegal aliens whom you state assisted you as a mechanic at the detention facility.

On May 4, 1994, the INS responded to a letter from you concerning your eligibility to retire under the LEO provisions. You were informed that you did not meet the definitions for law enforcement "primary

duties, primary position and/or secondary position." Therefore, any retirement application you submitted would be processed as an optional retirement under the Civil Service Retirement System (CSRS).

Under the CSRS, your claim of entitlement to LEO credit is governed by certain statutory definitions and regulatory requirements. **See**, 5 U.S.C. § 8331(20), defining LEO, and the Office of Personnel Management's (OPM) implementing regulations at 5 C.F.R. 831.901, **et. seq** and legal section **infra.**

Based upon our analysis of this claim, we have concluded that the information you have submitted in support of this claim does not establish your entitlement to LEO service credit for any of the time claimed, in light of standards set forth in applicable statutes, regulations and pertinent Merit Systems Protection Board (MSPB) case law. We first set forth the legal standards upon which our review of your claims was based and conclude with our analysis of the evidence you furnished in support of your claims.

II. a) Applicable Legal Standard: Timeliness

Prior to September 30, 1989, requests for LEO credit received by the employing agency, the agency where past service was performed or OPM could include all periods of service prior to September 30, 1989. After September 30, 1989, credit for service is not granted for a period greater than one year prior to the date that the request was received (5 C.F.R. 831.906 (e)). The time limit for filing may be extended if the individual shows that he was prevented by circumstances beyond his control from making the request within the time limit.

b) Applicable Legal Standard: LEO Coverage under CSRS

Under CSRS, a "law enforcement officer" is statutorily defined, in relevant part, as an employee whose duties are "primarily the investigation, apprehension, or detention of individuals suspected or convicted or offenses against the criminal laws of the United States." See, 5 U.S.C. § 8331 (20). The Civil Service Retirement Act of 1948 was the first legislation that made it possible for employees other than those of the federal Bureau of Investigation (FBI) to be considered for LEO credit.

The legislative history of that Act discusses Congress's intent that LEO positions be confined to those having "a **heavy and frequently hazardous responsibility** . . . [with] **employees subjected to physical dangers and hardships.**" The House Report on the legislation notes that the Civil Service Commission is to make determinations about whether an employee qualifies for LEO credit, by giving full consideration to **"the degree of hazard to which such officer or employee is subjected** in the performance of his duties, rather than the general duties of the class of position held by such officer or employee," (Emphasis supplied) H. Rep. No. 2034, 80th Cong. 2d. Sess., reprinted in 1948 U.S. Code Cong. & Ad. News 2275, 2276. Congress reiterated in amendments to the Act that covered positions are "far more taxing physically that most of the Federal Service," S. Rep. No. 93-948, 93rd Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 3698, 3699.

In defining "law enforcement officer," OPM's implementing regulations also make clear that the term does not include employees who guard against or

inspect for violations of law. The OPM regulations provide that: to qualify for LEO credit, the investigation of criminal activity must be the **primary** duty of the employee, i.e., "paramount in influence of weight" for a "substantial portion of the individual's working time over a typical work cycle." See, 5 C.F.R. 831-902.[1]

The MSPB has interpreted the CSRS definition of "law enforcement officer" and a recent decision references the "clearly expressed legislative intent" to weigh the physical demands of the job. **Hobbs v. O.P.M** (58 M.S.P.R. 628, 632 (1993)). Mr. Hobbs was employed as a Special Investigator with the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (ATF), investigating unfair competition and unlawful trade practices in the alcoholic beverage industry. According to the MSFB, such investigations were to encourage legitimate business to comply with the statutes ATF enforces.

In **Hobbs**, the Board noted that Congress intended to provide preferential early retirement provisions for employees engaged in the vigorous demands of occupations which are far more taxing physically than most of the Federal Service. LEO positions, said the Board, required not only physical stamina and vigor on the part of the investigator but "stringent physical requirements and [employees] performing at peak efficiency" (**Id.** at 632).

The Board also held that LEO credit was based upon a claimant's primary duties being "criminal investiga-

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[1] OPM's CSRS regulations also address supervisory and administrative positions, which are called "secondary" positions (5 C.F.R. 831.902).

tions" as distinguished form other types of investigations. Such investigations, said the Board:

> involve unusual physical hazards for the investigator, deriving from frequent contacts with criminal and suspected criminals . . . may often require that the investigator work for long stretches of time without a break, be on call 24 hours a day, and/or carry weapons (**Id.** at 633)

In **Sauser v. O.P.M.,** (59 M.S.P.R. 489, 494 (1993)), the Board reiterated the **Hobbs** standards, but approved LEO credit for an employee who actually engaged in surveillance and other intelligence-gathering activities and frequently pursued and helped apprehend criminals in situations involving great danger to himself.

With respect to persons seeking LEO credit for duties performed in prison or detention facilities, 5 U.S.C § 8331(20) (D) provides that there must be frequent and direct contact with persons suspected or convicted of offenses against the **criminal** laws of the United States. The statute also provides that the "direct contact" with these individuals must occur in the context of "supervision, training, employment, care, transportation, or rehabilitation" **See, Obremski v. Office of Personnel Management,** 633 F.2d. 1263 (D.C. Cir. 1983).

III. Evidence and Findings.

A review of the documentation in your file show that your request for service credit under § 8336(c) was written January 31, 1994, February 1, 1994, and again, on May 22, 1994. Therefore, you are eligible for consideration for coverage **only** for the period of January 31, 1993 to January 31, 1994, if the work you performed

during that time qualifies for primary and/or secondary law enforcement coverage. Your file lacks evidence to justify law enforcement coverage as required. Further, you did not provide any information that showed you were prevented by circumstances beyond your control from making the request within the time limit as provided in 5 C.F.R. 831.906.

Apart from the fact that the majority of your claim for LEO service credit is untimely, you provided no evidence which would establish that your work as a diesel mechanic primarily involved frequent direct contact with criminals at the detention center. You stated you were provided orientation on the security regulations and regulations regarding the care, custody and treatment of alien detainees and that you walked or transported aliens to a secured area for lunch.

You provided only a "work history" as a diesel mechanic at the Los Fresnos Detention Facility. In that history, you stated you were required to "utilize" alien detainees to assist you in maintaining the bus fleet. However, you provided no evidence that the detainees with whom you were in contact are being held for violations of criminal laws.

In summary, as you describe your duties covering the January 31, 1993 to February 1, 1994 time period, there is no evidence which shows that your job put you in frequent and direct contact with criminals. Your file contains no documentation from your supervisors or colleagues supporting your claims or describing your actual primary duties as being those of a law enforcement officer. Even if one were to accord your description of your work as meeting the criteria for coverage, you provided neither work-

sheets documenting the amount of time spent performing law enforcement duties nor performance appraisals outlining law enforcement job elements. For the reason cited above, the Department **denies** law enforcement coverage for the requested period of service.

You may appeal our decision to the MSPB by following the procedures in the enclosed Option Form 283, Appeal form. Please note that the request must be within 20 calendar days of the date of this letter. The date of filing is the date your appeal is postmarked or the date of receipt if you personally deliver it to the regional office. Your appeal request must be addressed to:

Regional Director
Merit Systems Protection Board
Dallas Regional Office
1100 Commerce Street, Room 6F20
Dallas, Texas 75242-09979

Sincerely,

/s/ STEPHEN R. COLGATE
STEPHEN R. COLGATE
Assistant Attorney General
for Administration

Enclosure